

CLERK US DISTRICT COURT  
NORTHERN DIST. OF TX  
FILED

2011 JUN -2 PM 3:50

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✓ ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

RANDY J. AUSTIN,  
Plaintiff

v.

KROGER TEXAS L.P. d/b/a KROGER  
STORE #209,  
Defendant

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CIVIL ACTION NO. \_\_\_\_\_

**8-11CV1169-B**

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DEFENDANT'S NOTICE OF REMOVAL

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TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

#49736

Pursuant to the terms and provisions of 28 U.S.C. §§ 1441 and 1446, Kroger Texas L.P. d/b/a Kroger Store #209 ("Kroger") in the cause styled "Randy Austin v. Kroger Texas L.P. d/b/a Kroger Store #209" originally pending as Cause No. CC-11-02853-B in the County Court at Law No. 2 of Dallas County, Texas, files this Notice of Removal of the cause to the United States District Court for the Northern District of Texas, Dallas Division.

1.

The basis of the removal of this action is diversity jurisdiction under 28 U.S.C. § 1332. In particular, diversity jurisdiction exists in this case because there is complete diversity of citizenship between the parties. Kroger is not a citizen of the State of Texas, and the amount in controversy exceeds \$75,000.00, exclusive of interest and costs. See 28 U.S.C. § 1332.

2.

Plaintiff, at the time of the initial filing of this action and at the current time of the removal of this action, was and is a citizen, resident, and domicile of the State of Texas.

3.

Real party in interest - Kroger Texas L.P., at the time of the initial filing of this action and at the time of the removal of this action, was and is a limited partnership formed under the laws of Ohio. The general partner of Kroger Texas L.P. is KRGP Inc., an Ohio corporation with its principal place of business in Ohio. The only limited partner is KRLP Inc., an Ohio corporation with its principle place of business in Ohio. Neither KPGP Inc. nor KRLP Inc., the only two partners of Kroger Texas L.P., has ever been a resident of, incorporated in, or had its principal place of business in the State of Texas.

4.

Plaintiff claims that, during the course and scope of his employment with Kroger, he was seriously injured when he slipped and fell on water while mopping the bathroom floors of the Kroger store. Plaintiff contends that the accident caused a severe left hip dislocation and left femur fracture. Plaintiff alleges these injuries have required six surgeries (to date) on his left hip and lower extremity, and that his left leg is now 2 inches shorter than his right leg.<sup>1</sup> Plaintiff filed suit on April 25, 2011, in the County Court at Law No. 2 of Dallas County, Texas, alleging negligence and gross negligence causes of action against Kroger.

5.

It is facially apparent from Plaintiff's Petition that the amount in controversy is over \$75,000. In addition to the past medical expenses for six surgeries, Plaintiff seeks reasonable and necessary future medical expenses, past and future physical pain and suffering, past and future mental anguish, permanent impairment, physical disfigurement, past and future lost wages, past

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<sup>1</sup> See Plaintiff's Original Petition, attached hereto as Tab 2(b).

and future loss of earning capacity, exemplary damages, pre-judgment and post-judgment interest and cost of suit. These allegations are sufficient to establish that the amount in controversy is at least \$75,000.00.<sup>2</sup> As a result, the amount in controversy in this case exceeds \$75,000.00, exclusive of interest and costs, and this case is removable.<sup>3</sup>

6.

This removal is timely because it is filed "within thirty days after receipt, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained the case is one which is or has just become removable." 28 U.S.C. § 1446(b). Kroger first became aware this case was removable on or about May 3, 2011, when Kroger was served with Plaintiff's Original Petition (date citation was mailed). Accordingly, this removal is timely because it is made within thirty days after the receipt by Kroger of the document which first demonstrated the case was removable. Moreover, more than one year has not passed since the commencement of the action in state court on April 25, 2011. 28 U.S.C. § 1446(b).

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<sup>2</sup> See *Gebbia v. Wal-Mart Stores, Inc.*, 233 F.3d 880, 883 (5th Cir. 2000) (affirming that it was "facially apparent" that the amount in controversy exceeded \$75,000 based on alleged injuries to wrist, knee, patella, and back and alleged damages for medical expenses, physical pain and suffering, mental anguish and suffering, loss of enjoyment of life, loss of wages and earning capacity, and permanent disability and disfigurement); see also *White v. FCI USA, Inc.*, 319 F.3d 672, 676 (5th Cir. 2003) (finding that at the time of removal, it was facially apparent by the "lengthy list of compensatory and punitive damages" sought by the plaintiff that the amount in controversy exceeded \$75,000); see also *Bourne v. Wal-Mart Stores, Inc.*, 582 F.Supp.2d 828 (E.D. Tex. 2008).

<sup>3</sup> See *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 492 (5th Cir. 1996); see also *Laughlin v. Kmart Corp.*, 50 S.W.3d 871, 873 (10th Cir. 1995) (amount in controversy is ordinarily determined by allegations in complaint).

7.

Venue is proper in this district under 28 U.S.C. § 1441(a) because this district and division embrace the county in which the removed action has been pending.

8.

Kroger filed with the Clerk of the County Court at Law No. 2 of Dallas County, Texas a Notice of Filing Notice of Removal to Federal Court simultaneously with the filing of this Notice of Removal.

9.

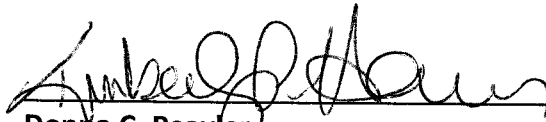
Pursuant to Local Rule 81.1, the following documents are attached:

- (1) State court docket sheet (as of June 2, 2011);
- (2) Index of State Court Filings:
  - (a) Plaintiff's Original Petition, and Request for Disclosures and Citation (filed 4/25/11);
  - (b) Defendant's Original Answer (filed 5/27/11); and
- (3) Certificate of Interested Parties.

Also, a Civil Cover Sheet and Supplemental Civil Cover Sheet are being filed with this Notice.

**WHEREFORE, PREMISES CONSIDERED,** Defendant respectfully prays that this case be removed to the United States District Court for the Northern District of Texas, Dallas Division.

Respectfully submitted,



**Donna C. Peavler**

Attorney-in-charge

State Bar No. 00783887

dpeavler@peavlergroup.com

**Kimberly P. Harris**

State Bar No. 24002234

kharris@peavlergroup.com

**THE PEAVLER GROUP**

3400 Carlisle Street, Suite 430

Dallas, Texas 75204

(214) 999-0550

(214) 999-0551 (fax)

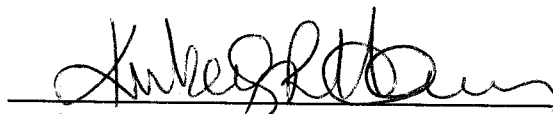
**ATTORNEYS FOR DEFENDANT  
KROGER TEXAS L.P.**

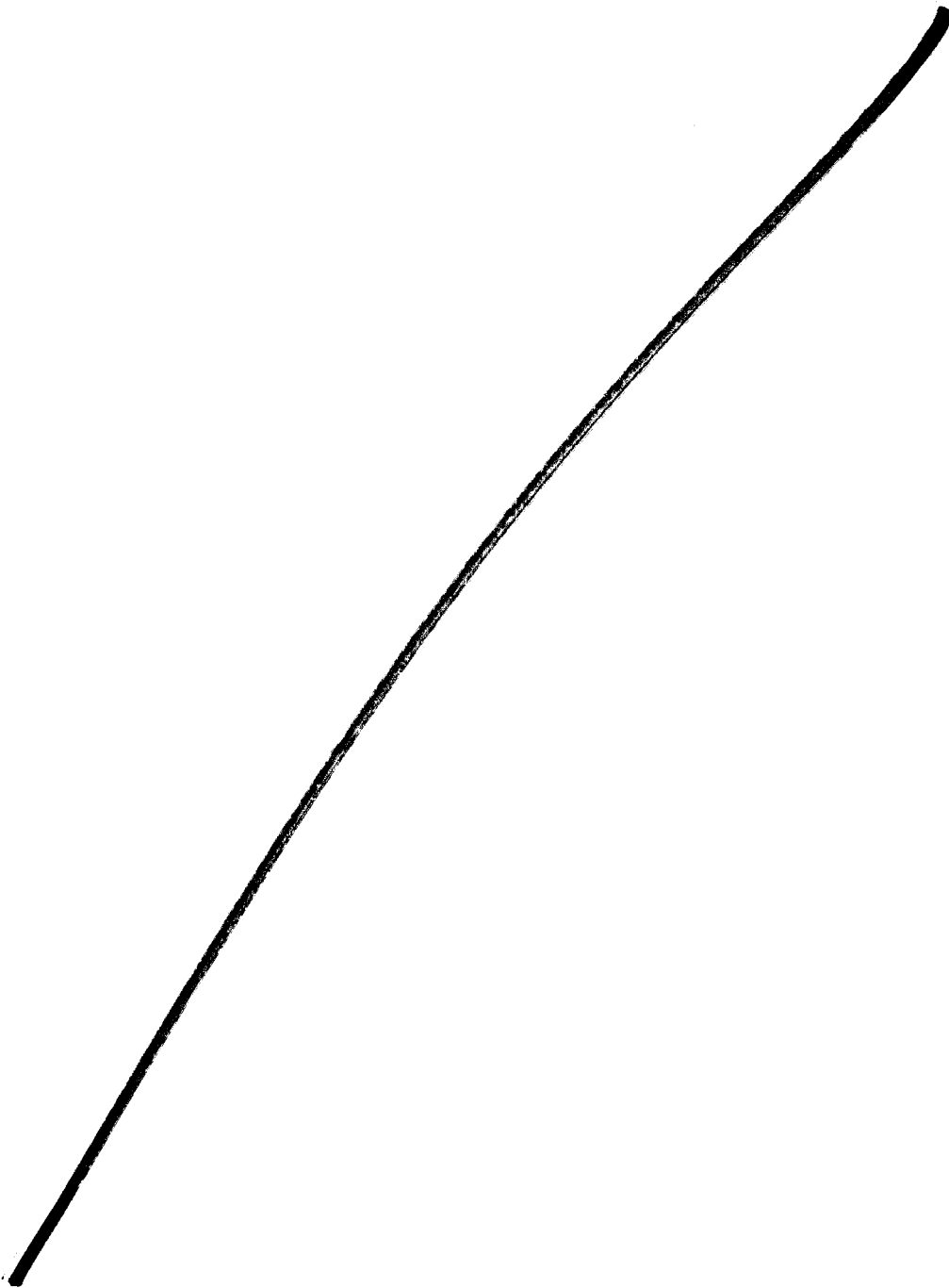
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following counsels of record:

Brent S. Freefield  
Rad Law Firm, P.C.  
12900 Preston Road, Ste. 900  
Dallas, Texas 75230

via first-class mail, in accordance with the Federal Rules of Civil Procedure on June 2, 2011.

  
Kimberly P. Harris



COUNTY COURT AT LAW NO. 2  
**DOCKET SHEET**  
CASE No. CC-11-02853-B

RANDY J AUSTIN  
vs. KROGER TEXAS LP, DOING BUSINESS AS  
KROGER STORE #209

§  
§  
§  
§

Location: County Court at Law No. 2  
Judicial Officer: FIFER, KING  
Filed on: 04/25/2011

CASE INFORMATION

Case Type: DAMAGES (NON COLLISION)  
Subtype: NEGLIGENCE

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number CC-11-02853-B  
Court County Court at Law No. 2  
Date Assigned 04/25/2011  
Judicial Officer FIFER, KING

PARTY INFORMATION

PLAINTIFF AUSTIN, RANDY J

Lead Attorneys

**FREEFIELD, BRENT STEWART**  
Retained  
972-661-1111(W)  
RAD LAW FIRM  
12900 PRESTON RD  
SUITE 900  
DALLAS, TX 75230

DEFENDANT **KROGER TEXAS LP**  
DOING BUSINESS AS KROGER STORE #209  
SERVE THROUGH CORPORATION SERICE COMPANY  
DBA CSC-LAWYERS INCO, REG AGENT  
211 E 7TH ST, STE 620  
AUSTIN, TX 00000

**HARRIS, KIMBERLY**  
Retained  
214-999-0550(W)  
THE PEAVLER GROUP  
3400 CARLISLE ST.  
SUITE 430  
DALLAS, TX 75204

DATE

EVENTS & ORDERS OF THE COURT

INDEX

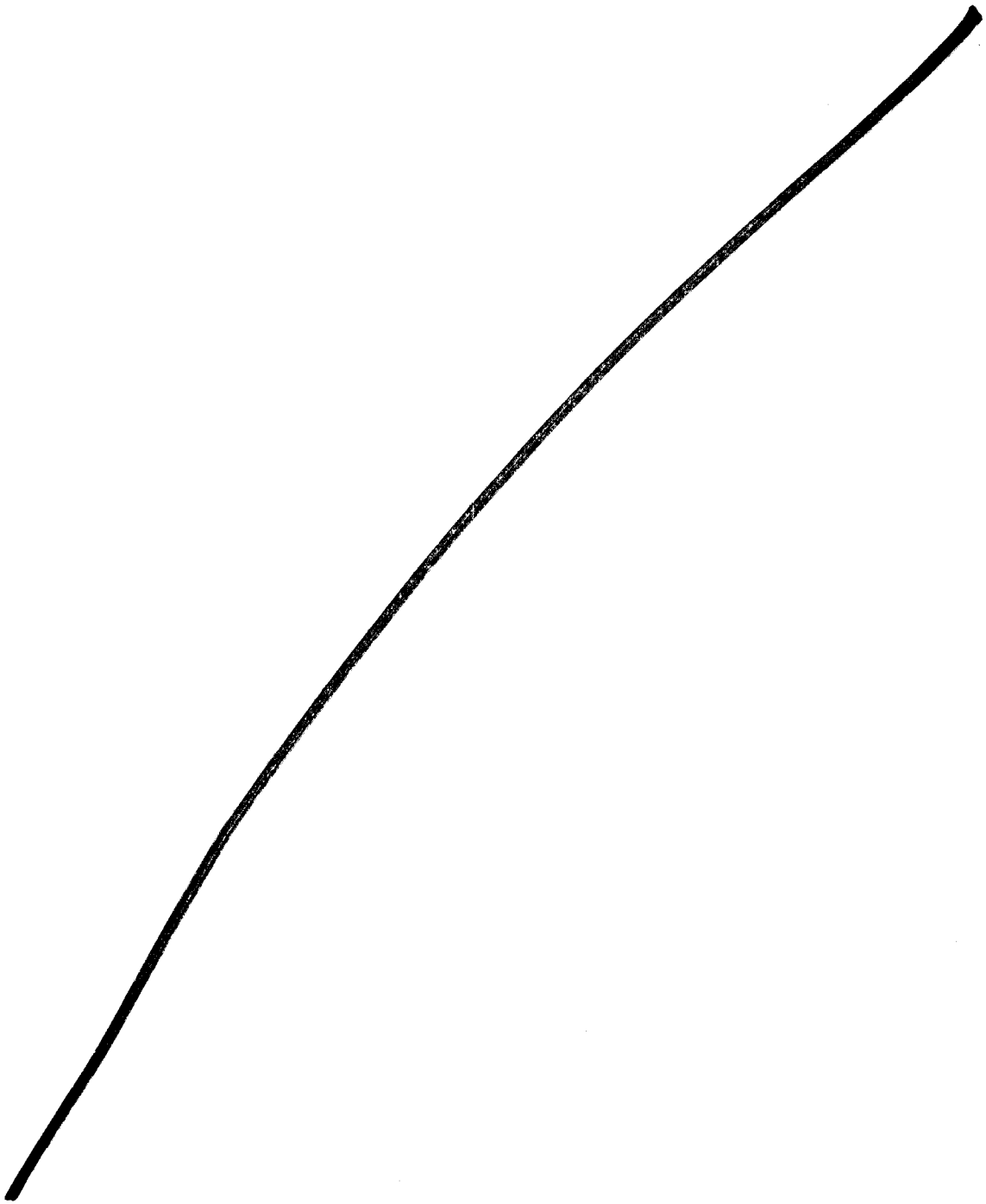
04/25/2011 ORIGINAL PETITION (OCA - NEW CASE FILED)  
04/25/2011 ISSUE CITATION  
04/25/2011 **CITATION (SERVICE)**  
KROGER TEXAS LP  
Served: 05/03/2011  
05/31/2011 ORIGINAL ANSWER  
Party: DEFENDANT KROGER TEXAS LP  
08/26/2011 **DISMISSAL HEARING (9:00 AM)** (Judicial Officer: FIFER, KING)

DATE

FINANCIAL INFORMATION

PLAINTIFF AUSTIN, RANDY J  
Total Charges  
Total Payments and Credits  
Balance Due as of 6/2/2011

221.00  
221.00  
0.00





IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

RANDY J. AUSTIN,  
Plaintiff

v.

KROGER TEXAS L.P. d/b/a KROGER  
STORE #209,  
Defendant

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CIVIL ACTION NO. \_\_\_\_\_

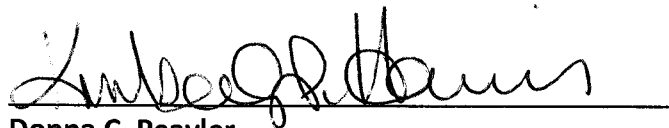
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INDEX OF STATE COURT FILINGS

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- (a) Plaintiff's Original Petition, and Request for Disclosures and Citation (filed 4/25/11); and
- (b) Defendant's Original Answer (filed 5/27/11).

Respectfully submitted,



**Donna C. Peavler**

Attorney-in-charge

State Bar No. 00783887

dpeavler@peavlergroup.com

**Kimberly P. Harris**

State Bar No. 24002234

kharris@peavlergroup.com

**THE PEAVLER GROUP**

3400 Carlisle Street, Suite 430

Dallas, Texas 75204

(214) 999-0550

(214) 999-0551 (fax)

**ATTORNEYS FOR DEFENDANT  
KROGER TEXAS L.P.**

MAIL

**CITATION**

**Cause #: CC-11-02853-B**

The State of Texas  
County Court at Law No. 2  
Dallas County, Texas

**SERVE:**

KROGER TEXAS LP, DOING BUSINESS AS  
KROGER STORE #209  
SERVE THROUGH CORPORATION SERVICE  
COMPANY  
DBA CSC-LAWYERS INCORPORATED  
211 E 7TH ST STE 620  
AUSTIN TX 00000

**PLAINTIFF(S) ATTORNEY:**  
**BRENT STEWART FREEFIELD**

RADLAW FIRM  
12900 PRESTON RD  
SUITE 900  
DALLAS TX 75230  
972-661-1111

"You have been sued. You may employ an attorney. If you or your attorney do not file a WRITTEN ANSWER with the clerk who issued this citation by 10:00 A.M. on the Monday next following the expiration of twenty days after you were served this citation and Original Petition, a default judgment may be taken against you. Your answer should be addressed to the clerk of County Court at Law No. 2 of Dallas County, Texas, at the George Allen Courts Building of said County 600 Commerce Street, Suite 101, Dallas, Texas 75202.

*Plaintiff(s),*  
**RANDY J. AUSTIN**  
*vs. KROGER TEXAS LP, DOING BUSINESS AS KROGER STORE #209*  
*Defendant(s)*

filed in said Court on the 25th day of April, 2011 a copy of which accompanies this citation.

**WITNESS: JOHN F. WARREN**, Clerk of the County Courts of Dallas County, Texas, **GIVEN UNDER MY HAND AND SEAL OF OFFICE**, at Dallas, Texas, and issued this 25th day of April, 2011 A.D.

JOHN F. WARREN  
Dallas County Clerk

Andrannette Iv. Deputy

**OFFICER'S RETURN**

Came to hand on the \_\_\_\_\_ day of \_\_\_\_\_ A.D., 20\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_\_\_ M. and executed by delivering to \_\_\_\_\_

(Name, Address where served including City, State and Zip)

on the \_\_\_\_\_ day of \_\_\_\_\_ A.D., 20\_\_\_\_ at \_\_\_\_\_ o'clock \_\_\_\_\_ M., the within named Defendant, in person, a true copy of this Citation, together with a copy of the Original Petition with date of service marked thereon.

\_\_\_\_\_  
County, Texas

\_\_\_\_\_  
Deputy

(Must be verified if served outside the State of Texas, or if served in Texas by anyone other than a Sheriff or Constable.)

Signed and sworn to by the said \_\_\_\_\_ before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, to certify which witness my hand and seal of office.

\_\_\_\_\_  
Notary Public \_\_\_\_\_ County \_\_\_\_\_

CAUSE NO. CC-11-02853-B

FILED  
JOHN F. WARREN  
COUNTY CLERK  
DALLAS COUNTY, TEXAS  
2011 APR 25 AM 11:27

RANDY J. AUSTIN,  
Plaintiff,

v.

KROGER TEXAS L.P., d/b/a KROGER  
STORE #209,  
Defendant.

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IN THE COUNTY COURT

AT LAW NO. 2

DALLAS COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DISCLOSURES**

**TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW, RANDY J. AUSTIN, Plaintiff, and files his Original Petition and Request for Disclosures, complaining of KROGER TEXAS L.P., d/b/a KROGER STORE #209 (hereinafter "KROGER"), Defendant, and would respectfully show unto the Court as follows:

**1.**

**LEVEL 2 DISCOVERY CONTROL PLAN**

- 1.1 Pursuant to Rule 190.3 of the Texas Rules of Civil Procedure, Plaintiff requests that discovery be conducted pursuant to a Level 2 discovery control plan.

**2.**

**JURISDICTION AND VENUE**

- 2.1 Jurisdiction is proper in this Court because the amount in controversy exceeds the minimum jurisdictional limits of this Court.
- 2.2 Venue is proper in Dallas County, Texas because the incident which forms the basis of this lawsuit arose in Dallas County, Texas, pursuant to Tex.Civ.Prac.&Rem.Code Section 15.002(a)(1).

**3.**

**PARTIES**

- 3.1 Plaintiff is an individual who resides in Dallas County, Texas.
- 3.2 Defendant KROGER TEXAS L.P., d/b/a KROGER STORE #209 is a foreign corporation doing business in Texas, and may be served with process by serving its

registered agent: Corporation Service Company d/b/a CSC-Lawyers Inco, located at 211 E. 7<sup>th</sup> Street, Suite 620, Austin, Texas.

4.

**FACTS**

- 4.1 On Monday, July 27, 2009, at approximately 10:30 a.m., Plaintiff was working in the course and scope of his employment for Defendant KROGER as a "Floor Clean-Up Person" at Kroger Store #209, located at 525 N. Galloway in Mesquite (Dallas County) Texas, 75149. Plaintiff was fifty-nine (59) years old on the date of incident.
- 4.2 At the time of the incident, Plaintiff was instructed by one of his supervisors at Defendant KROGER to mop and clean up large areas of the floor inside the store (including but not limited to the Men's and Ladies' Customer Restrooms) which became covered with "dirty condenser water mixed with cleaning solvent."
- 4.3 Defendant KROGER has its own "in-house" service and maintenance technicians (hereinafter "service crew") who were sent to the store in question to clean and service the large air conditioning/refrigeration condensers (approximately 4-6 in all) that were located on the roof of the KROGER store.
- 4.4 While cleaning and servicing the 4-6 condensers on the roof of the KROGER store, Defendant's in-house service crew used large quantities of water and a "cleaning solvent" to perform this task, which caused the "dirty condenser water mixed with cleaning solvent" to leak through the ceiling and/or HVAC duct system, where it accumulated on to the Mens' and Ladies' Customer Restroom floors.
- 4.5 As Plaintiff was attempting to mop and clean the "dirty condenser water mixed with cleaning solvent" in the Mens' Restroom, Plaintiff slipped and violently fell on his left side, which resulted in a severe left hip dislocation and left femur fracture. Plaintiff has now undergone six (6) surgeries (to date) on his left hip and left lower extremity as a result of the incident. Plaintiff's left leg is now two (2) inches shorter than his right leg as a result of the incident.
- 4.6 Defendant KROGER is a "non-subscriber" to Workers' Compensation insurance coverage as that term is understood under Texas law. As such, Defendant KROGER may not avail itself of the common-law defenses set forth in Section 406.033 of the Texas Labor Code.

5.

**NEGLIGENCE CAUSE OF ACTION: KROGER TEXAS L.P.,  
d/b/a KROGER STORE #209**

- 5.1 Plaintiff would show that, at the time of the incident, Defendant KROGER, by and through its employees, agents, representatives and/or vice principals, failed to exercise

the reasonable and ordinary care which a prudent owner and operator of a retail grocery store would exercise, with regard to one or more of the following particulars:

- a. Defendant failed to adequately staff its store with a reasonable number of "clean up" employees at the time of the incident;
  - b. Defendant failed to properly train Plaintiff on how to safely perform the task that Plaintiff was instructed to perform at the time of the incident;
  - c. Defendant failed to properly supervise Plaintiff to make sure that Plaintiff was safely performing the task at the time of the incident;
  - d. Defendant failed to adequately warn Plaintiff of the dangers associated with the task which Defendant instructed Plaintiff to perform at the time of the incident;
  - e. Defendant failed to provide Plaintiff with the proper clothing (shoes), tools and equipment which would have enabled Plaintiff to safely perform the task that he was instructed to perform at the time of the incident;
  - f. Defendant failed to coordinate the cleaning and servicing of the large 4-6 condensers on its roof during a time when the store was closed (or had minimal customer traffic) such that Plaintiff would have adequate time and assistance from his co-workers to get the water off the restroom floors;
  - g. Defendant failed to place liquid absorption materials on the floor prior to having its condensers cleaned and serviced, so as to reduce or eliminate the dangers associated with large accumulations of water on the floor; and
  - h. Defendant failed to instruct its service crew to place liquid absorption materials on the floor prior to having its condensers cleaned and serviced, so as to reduce or eliminate the dangers associated with large accumulations of water on the floor.
- 5.2 Defendant KROGER owed Plaintiff a duty of reasonable and ordinary care. Said Defendant breached its duty to Plaintiff through one or more of the negligent acts and/or omissions set forth above, and said breach was a proximate cause of Plaintiff's injuries and damages.

6.

**PREMISES LIABILITY CAUSE OF ACTION:**  
**DEFENDANT KROGER TEXAS L.P., d/b/a KROGER STORE #209**

- 6.1 The large accumulation of water in Defendant's customer restrooms posed an unreasonable risk of harm;
- 6.2 Defendant knew or reasonably should have known of the danger;

- 6.3 Defendant failed to exercise ordinary care to protect Plaintiff from the danger, by both failing to adequately warn Plaintiff of the condition and failing to make the condition reasonably safe.
- 6.4 Defendant owed Plaintiff a duty of reasonable care. Defendant breached its duty of care to Plaintiff, and said breach was a proximate cause of Plaintiff's injuries and damages for which he sues.

7.

**GROSS NEGLIGENCE**

- 7.1 The conduct of Defendant constituted acts and/or omissions which when viewed objectively from the standpoint of the actor at the time of its occurrence, involved an extreme degree of risk considering the probability and magnitude of the potential harm to others and of which Defendant had actual subjective awareness of said risk but nevertheless proceeded with conscious indifference to the rights, safety or welfare of Plaintiff. Accordingly, the imposition of punitive (exemplary) damages against Defendant is sought herein.

8.

**DAMAGES**

- 8.1. As a proximate result of Defendant's negligence and gross negligence, Plaintiff sustained serious and permanent bodily injuries. These injuries caused Plaintiff to sustain physical pain and suffering, mental anguish, permanent impairment and physical disfigurement, both in the past and continuing into the future.
- 8.2 Plaintiff has incurred reasonable and necessary medical expenses in the past, and will in all reasonable probability incur medical expenses in the future.
- 8.3 Plaintiff has incurred lost wages in the past, and will in all reasonable probability incur lost wages in the future.
- 8.4 Plaintiff seeks to recover for his past and future loss of earning capacity due to the injuries he sustained.
- 8.5 Plaintiff seeks to recover from Defendant all of the damages set forth herein.

9.

**REQUEST FOR DISCLOSURES**

- 9.1 Pursuant to Rule 194 of the Texas Rules of Civil Procedure, Defendant is hereby requested to disclose to Plaintiff, within fifty (50) days of service of this request, the information and documents described in Rule 194.2 (a) through (l), to be produced to the undersigned at Rad Law Firm, P.C., North Dallas Bank Tower, 12900 Preston Road, #900, Dallas, Texas 75230.

**10.**  
**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that Defendant be cited to appear and answer, and on final trial, that Plaintiff have judgment against Defendant, for:

1. Actual damages;
2. Punitive (exemplary) damages;
3. Pre-judgment and post-judgment interest as allowed by law;
4. Costs of suit; and
5. Any further relief, at law and in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

**RAD LAW FIRM, P.C.**

BY 

**BRENT S. FREEFIELD**

State Bar No. 07417350

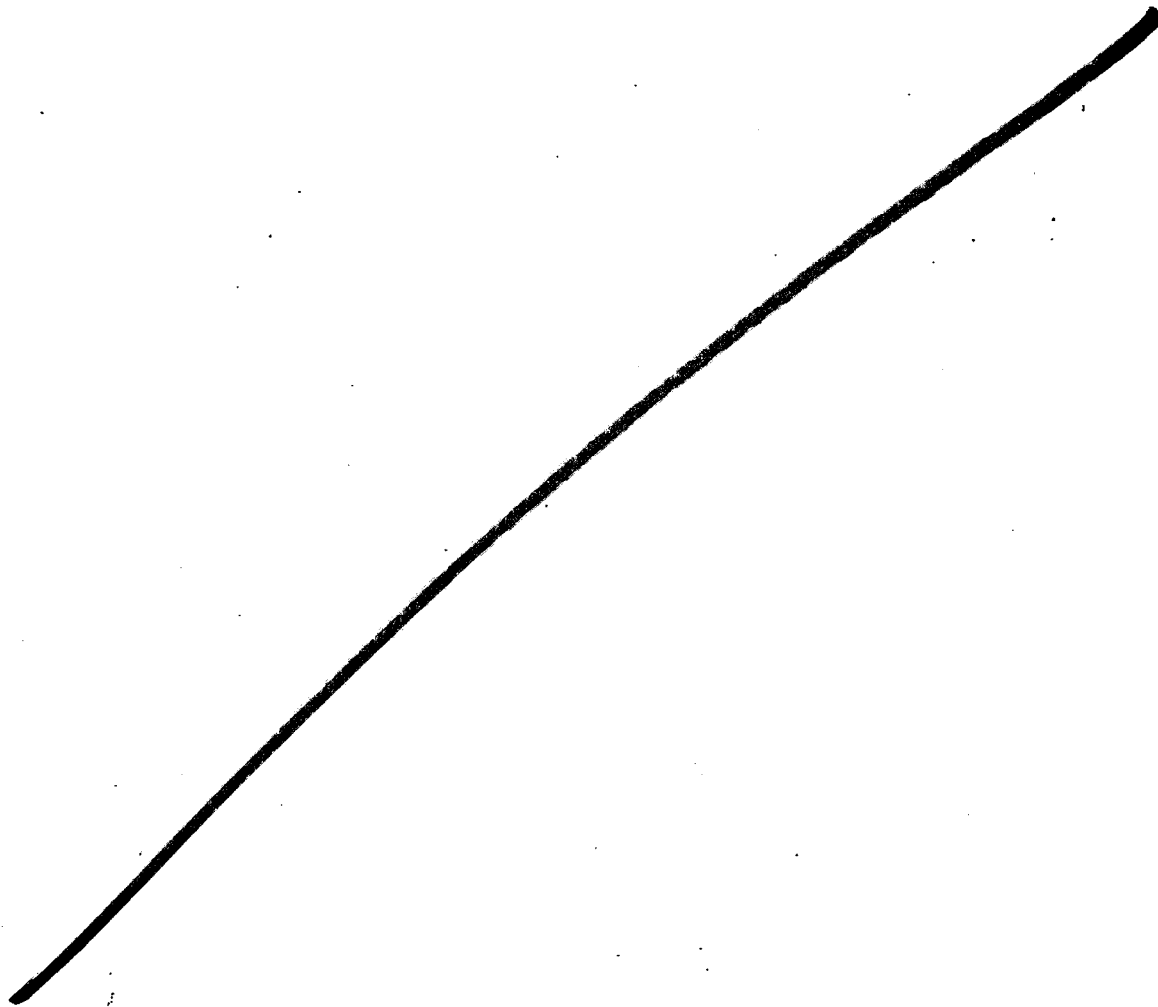
12900 Preston Road, Suite 900

Dallas, Texas 75230

(972) 661-1111 – Telephone

(972) 661-3537 – Facsimile

**ATTORNEY FOR PLAINTIFF**

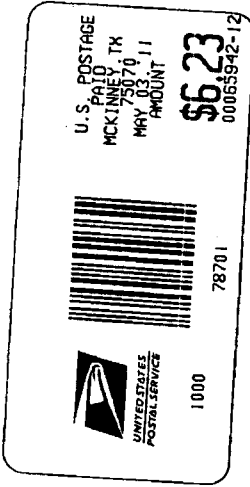
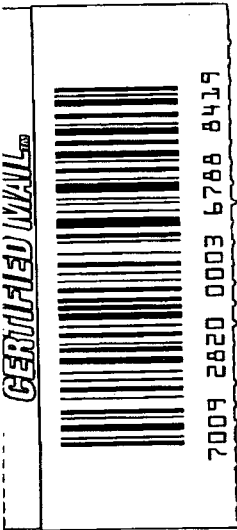


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APR 27 2011  
BY: \_\_\_\_\_

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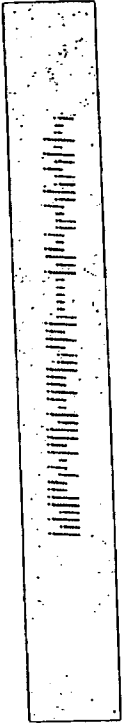


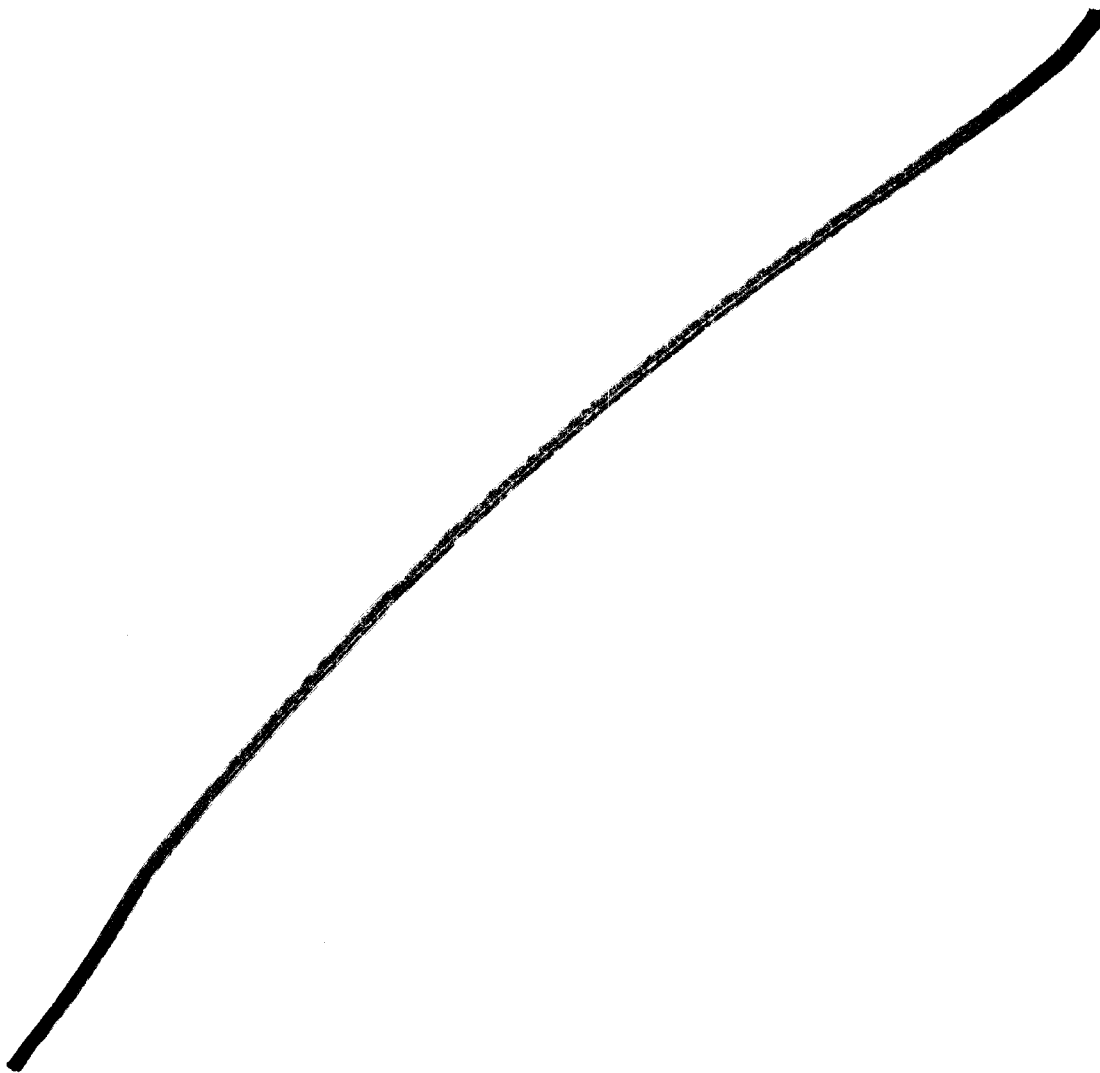
LEGAL Doc MGMT  
2025 VISTA CREST DR.  
CARROLLTON, TX 75007



CORPORATION SERVICE COMPANY  
211 E. 7TH ST, #620  
AUSTIN, TX 78701

RETURN RECEIPT  
REQUESTED





CAUSE NO. CC-11-02853-B

RANDY J. AUSTIN,  
Plaintiff,

vs.

KROGER TEXAS L.P. d/b/a KROGER  
STORE #209,  
Defendant.

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IN THE COUNTY COURT

AT LAW NO. 2

DALLAS COUNTY, TEXAS

2011 MAY 31 AM 10:11

FILED  
JOHN F. WARREN  
COUNTY CLERK  
DALLAS COUNTY, TEXAS

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**DEFENDANT'S ORIGINAL ANSWER**

---

Defendant Kroger Texas L.P. d/b/a Kroger Store #209 hereby files its Original Answer to Plaintiff's Original Petition and in support thereof states as follows:

**I.**

**SPECIAL EXCEPTIONS**

Defendant objects and specially excepts to Plaintiff's Original Petition in that it fails to specify the maximum amount of damages claimed. Pursuant to Rule 47 of the Texas Rules of Civil Procedure, Defendant hereby requests that the Court require Plaintiff to replead, specifying the maximum amount of damages claimed.

**II.**

Defendant prays that Plaintiff be required to replead the foregoing pleadings within seven (7) days or that the Petition should be stricken.

**III.**

**GENERAL DENIAL**

Defendant denies each and every material allegation contained in Plaintiff's Original Petition, demands strict proof thereof, and to the extent that such matters are questions of

fact, says Plaintiff should prove such facts by a preponderance of the evidence to a jury if he can so do.

IV.  
DEFENSES

Pleading further, Defendant states that Plaintiff's damages complained of, if any, were the result of prior or pre-existing injuries, accidents, or conditions, and said prior or pre-existing injuries, accidents, or conditions, were the sole and/or a contributing cause of the Plaintiff's alleged damages.

V.

Defendant contends that Plaintiff's damages or injuries, if any, were caused by the acts of third persons not under the control of Defendant. Such acts or omissions of said third persons were the sole and/or producing and/or proximate cause of Plaintiff's damages or injuries, if any.

VI.

Defendant claims that Plaintiff failed to use that degree of care and caution as would have been used by a reasonable person under the same or similar circumstances, thereby proximately causing Plaintiff's injuries and damages, if any. Such acts or omissions of Plaintiff were the sole proximate cause of Plaintiff's damages or injuries, if any.

VII.

Further, Plaintiff breached his duty to mitigate damages by failing to exercise reasonable care and diligence to avoid loss and minimize the consequences of damages.

VIII.

Defendant alleges that the accident complained of was an unavoidable accident as that term is known in law.

IX.

Moreover, Defendant is not liable to Plaintiff because Plaintiff was doing the same character of work that he had always done and that other employees in other stores were required to do, and the work involved was not unusual.

X.

Defendant respectfully demands a court reporter be present at all proceedings before the Court.

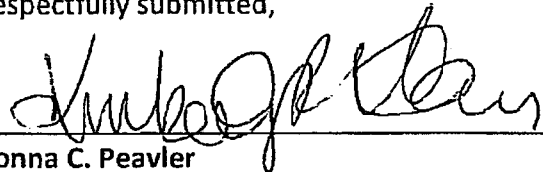
XI.

Defendant contends that any claims for medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of Plaintiff pursuant to Texas Civil Practice and Remedies Code §41.0105.

XII.

Defendant states that in the unlikely event that an adverse judgment would be rendered against it in this matter, Defendant would respectfully pray for contribution, indemnity and/or all available credits as provided for in the Texas Civil Practice and Remedies Code and under Texas law.

Respectfully submitted,



Donna C. Peavler

State Bar No. 00783887

Kimberly P. Harris

State Bar No. 24002234

**THE PEAVLER GROUP**

3400 Carlisle Street, Suite 430

Dallas, Texas 75204-1221

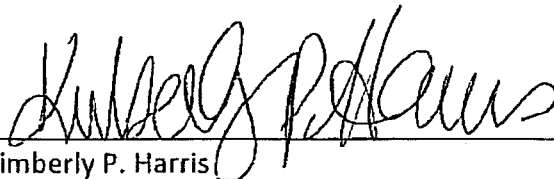
(214) 999-0550

(214) 999-0551 (fax)

**ATTORNEYS FOR DEFENDANT**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record pursuant to the Texas Rules of Civil Procedure on May 27, 2011.



Kimberly P. Harris

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

## DEFENDANTS

(b) County of Residence of First Listed Plaintiff Dallas  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Ohio  
(IN U.S. PLAINTIFF CASES ONLY)

(c) Attorney's (Firm Name, Address, and Telephone Number)  
Brent Freefield, Rad Law Firm, P.C., 12900 Preston Road, Ste. 900  
Dallas, Texas 75230, 972-661-1111

Attorneys (If Known)  
Donna C. Peavler and Kimberly P. Harris, The Peavler Group, 3400  
Carlisle St. Ste. 430, Dallas, Texas 75204, 214-999-0550.

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                                   | DEF                        |   | PTF                        | DEF                                   |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input checked="" type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

## V. ORIGIN

(Place an "X" in One Box Only)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:  
Negligence

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

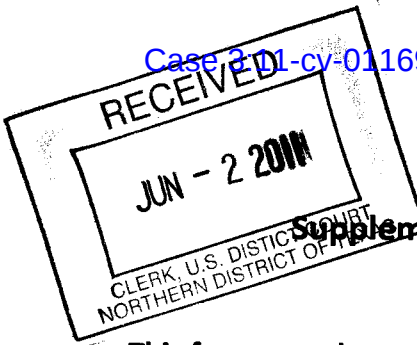
AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

**United States District Court  
Northern District of Texas**



**Supplemental Civil Cover Sheet For Cases Removed From  
State Court**

**8-11CV1169-B**

**This form must be attached to the Civil Cover Sheet at the time the case is filed in the U.S.  
District Clerk's Office. Additional sheets may be used as necessary.**

**1. State Court Information:**

Please identify the court from which the case is being removed and specify the number assigned to the case in that court.

**Court**

**Case Number**

County Court at Law No. 2, Dallas County

CC-11-02853-B

**2. Style of the Case:**

Please include all Plaintiff(s), Defendant(s), Intervenor(s), Counterclaimant(s), Crossclaimant(s) and Third Party Claimant(s) still remaining in the case and indicate their party type. Also, please list the attorney(s) of record for each party named and include their bar number, firm name, correct mailing address, and phone number (including area code.)

**Party and Party Type**

**Attorney(s)**

Plaintiff

Randy J. Austin

Brent S. Freefield

Rad Law Firm, P.C.

State Bar No. 0741735

12900 Preston Road, Ste. 900

Dallas, Texas 75230

972.661.1111

Defendant

Kroger Texas L.P. d/b/a

Kroger Store #209

Donna C. Peavler

Attorney-in-charge

State Bar No. 00783887

Kimberly P. Harris

State Bar No. 24002234

The Peavler Group

3400 Carlisle St., Suite 430

Dallas, Texas 75204

214.999.0550

**3. Jury Demand:**

Was a Jury Demand made in State Court?

☒ Yes    ☐ No

If "Yes," by which party and on what date?



\_\_\_\_\_  
Party

\_\_\_\_\_  
Date

4. **Answer:**

Was an Answer made in State Court?

X Yes ☐ No

If "Yes," by which party and on what date?

Kroger Texas L.P.

Party

May 27, 2011

Date

5. **Unserved Parties:**

The following parties have not been served at the time this case was removed:

Party

Reason(s) for No Service

None

6. **Nonsuited, Dismissed or Terminated Parties:**

Please indicate any changes from the style on the State Court papers and the reason for that change:

Party

Reason

None

7. **Claims of the Parties:**

The filing party submits the following summary of the remaining claims of each party in this litigation:

Party

Claim(s)

Plaintiff

Negligence

Defendant

Contributory Negligence